Petition

Office - Supreme Court, U.S.
FILED
SEP 25 1981

81-624
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October 1981, Term

JOHN E. O'CONNELL AND
JEANNE O'CONNELL, Individually
and as members of a class,
Petitioners,

v.

GORDON KNISKERN, Superintendent of Schools of the School District of Mukwonago, and GEORGE CHRONIS, THOMAS DAY, ROBERT HILL, WAYNE HUNNICUTT, WILLIAM KINGSTON, MAXINE LEENHOUTS, EDGAR SCHULTZ, CLIFFORD SULLIVAN, and RUTH ELLEN YERKE, as members of the Board of School Directors of the School District of Mukwonago, and BARBARA THOMPSON, Superintendent of the State of Wisconsin Department of Public Instruction,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Jeanne O'Connell

QUESTIONS PRESENTED

1. Whether Sec. 121.54(2) Wis. Stat. (1973) on its face or as applied to the plaintiffs, operates to deny the plaintiffs the equal protections of the law guaranteed by the fourteenth amendment to the United States constitution.

2. Whether the Mukwonago School District adopted policies to implement the provisions of Sec. 121.54 (2) Wis. Stat. (1973), and, if so, whether these policies, on their face, or as applied to the plaintiffs, operate to deny them the equal protection of the law as guaranteed by the fourteenth amendment to the United States constitution.

3. Whether pupils attending Catholic Memorial High School and residing in the Mukwonago School District constitute a suspect class.

4. Whether the pupils attending Catholic Memorial High School and residing in the Mukwonago School District were consistently discriminated against by the Board of Education of Mukwonago.

INDEX

Page

Opinions Below 2

Jurisdiction 2

Statutes and Constitutional Provisions Involved 2

Statement of the Case 10

Reasons for Granting the Writ 12

I. The Discriminatory Application Of The Statutory Scheme For Transportation Of Parochial School Pupils Has Been Ignored By The Lower Courts 12

II. The Federal Court Of Appeals Has Rendered A Decision In This Case Which Appears To Conflict With The Ruling Of A Three-Member Panel In Deutsch v. Teal 16

Conclusion 17

Appendix A-1

Order of the Court of Appeals A-1

Judgment of Court of Appeals B-1

Decision and Order of the District Court C-1

Judgment of the District Court D-1

CITATIONS

Page

Cases

Deutsch v. Teal
400 F. Supp. 598 (1975) 16

O'Connell v. Board of Education,
82 Wis. 2d 728, N.W.
2d 561 (1978) 12

Yick Wo v. Hopkins,
118 U.S. 356, 6 Sup. Ct.
Rep. 1064 (1886) 12

Young v. Board of Education,
74 Wis. 2d 144, 246 N.W.
2d 230 (1976) 12,16

Statutes and Constitutional Provisions

Sec. 121.54 Wis. Stat. (1973) 16

Sec. 121.55 Wis. Stats. (1973) 9

Public Health and Welfare,
42 USC, §1983 9,12

U.S. CONST.,
amend. XIV, §1 9

WIS. CONST.,
art. I, §23 9,10

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Schools of the School District of
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CLIFFORD SULLIVAN, and RUTH ELLEN
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School Directors of the School District
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Superintendent of the State of Wisconsin
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On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, John E. O'Connell and Jeanne O'Connell, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this action on July 2, 1981.

OPINIONS BELOW

The decision and order of the court of appeals, dated July 2, 1981, is an unpublished order, and is reproduced in the Appendix to this petition, *infra*, at A-1 *et seq.*

The decision and order of the United States District Court for the Eastern District of Wisconsin, dated February 29, 1980, is reported at 484 F.Supp. 896 and reproduced in the Appendix to this petition, *infra*, at C-1 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 2, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §2101(c).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 121.54 Wis. Stat. (1973) provides:

(1) City option. Subsections (2) and (6) and s. 121.57 do not apply to pupils who reside in cities unless the school they attend is located outside the city but within the boundaries of the school district. Where an annual or special meeting of a common school district or a union high school district, or the school board of a city school district or unified school district determines to provide transportation for such pupils, state aid shall be paid in accordance with s. 121.58 and there shall be reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools.

(2) General transportation. (a) Except as provided in sub. (1), every school board shall provide transportation to and from public school for all pupils who reside in the school district 2 miles or more from the nearest public school they are entitled to attend.

(b) 1. Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school he attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from his residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

2. In lieu of transporting students under subd. 1 and paying for transportation under sub. (8) (b), an underlying elementary school district or a union high school district may elect, by resolution adopted at its annual or special meeting, to transport elementary school children who reside within the underlying district and qualify for transportation under subd. 1, in vehicles owned, operated or contracted for by the district. Once adopted, such a resolution may be repealed only upon one year's notice to the board of the union high school district of which the underlying district is a part. An elementary school district shall notify the union high school district of any action under this paragraph no later than June 15 preceding the school year in which the elementary school district's action takes effect.

3. No later than May 15 in each year, each private school shall notify each school board of the names, grade levels and locations of all pupils, if any, eligible to have transportation provided by such school

board under this paragraph and planning to attend such private school during the forthcoming school term. The school board may extend the notification deadline.

(c) An annual or special meeting of a common school district or union high school district, or the school board of a city school district or unified school district may determine to provide transportation for all or part of the pupils who reside in the school district to and from the nearest public school they are entitled to attend or the private school within or without the school district within who attendance area they reside, but if transportation is provided for less than all such pupils there shall be reasonable uniformity in the minimum distance that pupils attending public and private schools will be transported. Except for elementary school districts electing to furnish transportation under par. (b) 2, this paragraph does not permit the annual or special meeting or school board in a district operating only elementary grades to provide for the transportation of pupils attending private schools.

(d) A school board may provide transportation for teachers to and from public school, subject to the same controls and limitations as apply to the transportation of pupils.

(3) Transportation for handicapped. Every school board shall provide transportation for handicapped children, as defined in s. 115.76(1), to any public or private elementary or high school, to the Wisconsin school for the visually handicapped or the Wisconsin school for the deaf or to any special educational program for handicapped children sponsored by a state tax-supported institution of higher education, regardless of distance, if the request for such transportation is approved by the state superintendent.

Approval shall be based on whether or not the child can walk to school with safety and comfort. Section 121.53 shall apply to transportation provided under this subsection.

(4) Summer class transportation. A school board may provide transportation for pupils residing in the school district and attending summer classes. If the school board provides transportation for less than all pupils, there shall be reasonable uniformity in the minimum and maximum distances pupils are transported.

(5) Transportation to vocational schools. The school board of a district operating high school grades may provide for the transportation or board and lodging of residents of the school district attending vocational, technical and adult education schools outside the school district who are not high school graduates, are less than 20 years of age and attend such schools full time. The school district shall be paid state aid for such transportation or board and lodging in accordance with s. 121.58. This subsection shall not apply to cases where the distance between a pupil's home and the vocational, technical and adult education school along the usually traveled public highway is more than 15 miles, except where the pupil resides on an approved bus route or where board and lodging are provided.

(6) Transportation in special cases. The school board of a district operating high school grades which, under s. 121.84(2), must permit a pupil to attend high school outside the school district shall provide transportation for such pupil if he resides 2 or more miles from the high school he attends.

(7) Transportation for extracurricular activities. (a) A school board may provide transportation for pupils attending public schools only, their parents or guar-

dians, authorized chaperones, school district officers, faculty and employes and school doctors, dentists and nurses in connection with any extracurricular school activity, such as a school athletic contest, school game, school outing or school field trip or any other similar trip when:

1. A school bus which is regularly used by or for the school district is used and such transportation is under the immediate supervision of a competent adult employe of the school district and the school bus is operated by a driver regularly used as a bus driver by the school district;

2. A school operated by the school district has an actual educational interest in such activity;

3. Such use does not extend more than 50 miles beyond the boundary of this state, but this restriction does not apply to any such use by the Wisconsin school for the deaf or by the Wisconsin school for the visually handicapped; and

4. The school principal or other person with comparable authority authorizes such use.

(b) The school board may make a charge for such transportation, to be paid by the persons transported, sufficient to reimburse it for the use of the school bus. If the school bus is operated by a person under contract with the school board under s. 121.52(2) (b), the school board may authorize a charge for the transportation, to be paid by the persons transported, sufficient to make reimbursement for such use.

8. Payment of transportation costs. (a) The cost of providing transportation for pupils under subs. (1) to (6) and s. 121.57 shall be paid by the school district in which they reside, and no part of such cost may be charged to the pupils or their parents or guardians.

(b) At the end of the school term, every union high school district shall submit to each of its underlying school districts operating only elementary grades a certified statement of the actual cost for the school year, less the amount to be paid for such pupils for that school year under s. 121.58(2), of transporting the private school pupils residing in the underlying school district under sub. (2) (b). On or before June 30 in each year each underlying school district shall reimburse the union high school district for the net cost of transporting its resident private school pupils as so reported in the statement.

(9) Transportation in areas of unusual hazards. In school districts in which unusual hazards exist in walking to and from school for pupils who reside less than 2 miles from the school where they are enrolled, the school board may develop a plan which shall show by map and explanation the nature of the unusual hazards to pupil travel and propose a plan of transportation which will provide proper safeguards for the school attendance of such pupils. Copies of the plan shall be filed with the sheriff of the county in which the principal office of the school district is located. The sheriff shall review the plan and may make suggestions for revision that he deems appropriate. He shall investigate the site and plan and make a determination as to whether unusual hazards exist which cannot be corrected by local government. He shall report his findings in writing to the school board concerned. Any person aggrieved by the determination made by the sheriff may appeal the determination to the state superintendent who shall make a determination upon which the school board shall act. If the findings support the plan and the determination that unusual hazards exist which seriously jeopardize the safety of the pupils in their travel to and from school, the school board may put the plan for transportation into effect, but no part of the costs

resulting from the transportation of pupils under this subsection may be reimbursed from state funds.

2. Section 121.55 Wis. Stat. (1973) provides:

Methods of providing transportation

(1) School boards may provide transportation by any of the following methods:

(a) By contract with a common carrier, a taxi company or other parties.

(b) By contract with the parent or guardian of the pupil to be transported. If the school board and the parent or guardian cannot agree upon the amount of compensation, the department shall determine the amount of compensation to be designated in the contract.

(c) By contract with another school board, board of control of a co-operative educational service agency or the proper officials of any private school or private school association.

(d) By contract between 2 or more school boards and an individual or a common carrier.

(e) By the purchase and operation of a motor vehicle.

(2) The term of any contract made under this section shall not exceed 3 years.

(3) A school board may fulfill its obligation to transport a pupil under s. 121.54(2) (b) 1 by offering to contract with the parent or guardian of the pupil for an annual payment for each pupil of not less than $5 times the distance in miles between the pupil's residence and the private school he attends. Such contract shall provide for a payment of not less than $80 per pupil per year, but the payment shall not exceed the actual cost nor may the aids paid under s. 121.58(2) (a) for the pupil exceed the cost thereof.

3. Section 1983, 42 USC provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Section 1, Fourteenth Amendment to U.S. Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

5. Section 23, Article I, Wisconsin Constitution provides:

Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.

STATEMENT OF THE CASE

Following the enactment of Article I, Sec. 23 of the Constitution of the State of Wisconsin, and the statutory scheme for the transportation of non-public school pupils authorized thereby, pupils attending Catholic Memorial High School in the City of Waukesha who were residents of the school district of Mukwonago were provided with one bus for their transportation to and from school until about October 15, 1973. Said transportation was provided pursuant to resolutions passed at meetings of the district conducted pursuant to an agenda formulated and administered by the school board. During all of said period, standards for the length of bus routes and the period of time during which students should be involved in the transportation process were in effect as promulgated by the Wisconsin Department of Public Instruction. All of the public school transportation in the district of Mukwonago adhered to the state standards above described, and no route exceeded approximately twenty miles. Conversely, the routes for Memorial students equaled or exceeded approximately sixty-four miles in length and involved transportation periods of up to approximately four hours. Catholic Memorial High School is located on premises slightly more than five miles beyond the district boundary of the school district of Mukwonago. Both the public and non-public school standards require mandatory transportation be provided to pupils who reside more than two miles from their school. The customary measurement tool utilized in close cases has been historically the automobile odometer.

During the period between 1969 and 1974, the resolution to extend the five-mile limit was arrived at for action by the district electors at meetings customarily between 11 P.M. and 12 A.M. in the evening. All of the resolutions involved distances for

extending the five-mile limit of approximately seven to eight miles, and the actual distance beyond the district boundary was not a matter of public knowledge until a state court suit substantially similar to this federal suit was commenced in 1974 following the narrow defeat of a resolution to extend the five mile limit in August of 1974.

About October 15, 1973, the school board unilaterally removed the publicly-financed bus and substituted parent contracts, which in the aggregate approximated a sum some $2,000 less than the 1973 cost of providing "one-bus" transportation for Memorial students in the Mukwonago School District. No explanation for this action of the school board was provided in 1973, or, indeed, to the present date.

The deliberate late scheduling of resolutions to extend the five-mile limit had its natural and intended effect in 1974, especially when coupled with the 1973 removal of the bus. The resolution to extend the five-mile limit was narrowly defeated as a result of the frustration of Memorial parents and their supporters who had found the democratic process as administered by the school board of Mukwonago highly offensive, deliberately rude, obnoxious and rather useless.

From the foregoing, it is apparent that Memorial students residing in the Mukwonago School District have been unfairly treated by the public authority charged by law with the responsibility of providing for their transportation from 1968 until the present. Such treatment has been characterized in substance in a state court suit on May 9, 1977, as so bad that it adversely affected the educational program of these students. This characterization was made in essence by the Superintendent of Schools, Gordon Kniskern.

The subject matter of this suit was before the Wisconsin Supreme Court twice before being dismissed without prejudice. *Young v. Board of Education*, 74 Wis. 2d 144, 246 N.W. 2d 230 (1976) and *O'Connell v. Board of Education*, 82 Wis. 2d 728, N.W. 2d 561 (1978). Following the *O'Connell* decision, supra, the instant litigation was commenced, pursuant to 42 USC, §1983).

REASONS FOR GRANTING THE WRIT

I. The Discriminatory Application Of The Statutory Scheme For Transportation Of Parochial School Pupils Has Been Ignored By The Lower Courts.

The most cursory review of the petitioners' affidavits and briefs clearly indicates that the primary thrust of the petitioners' case was directed toward the criticism of the administration of the statutory scheme by the Mukwonago School District during the period transportation was mandated by district electors. However, the decision of the federal district court, and indeed the arguments and briefs of the defendants, totally ignored these issues and focused on the neutral-appearing terms and provisions of the statutes. This form of legal analysis would have produced an opposite result in the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 Sup. Ct. Rep. 1064 (1886), for the reason that the ordinance requiring a license to operate a laundry adopted by San Francisco did not contain specific language prohibiting the issuance of such licenses to people of Chinese origin. The plain sense of the matter is that the petitioners could agree in substance with almost everything the federal district court, and indeed the defendants, have said concerning the statutes herein involved, and still be unable to make such statutory scheme operate to provide a

transportation benefit of any significance for their children. The petitioners, together with other members of their class, could cause another resolution to transport their children to be passed at an annual or special meeting of the district, but the petitioners could not force the Mukwonago School Board to equitably administer transportation statutes by providing transportation to their children in accordance with state qualitative standards. Nor could the petitioners and other members of their class force the Mukwonago School Board to refrain from substituting a parent contract instead of a bus, so that the transportation being provided was a sum of money given to a parent rather than actual transportation of a child to school. The petitioners submit that the Wisconsin electorate, when it passed the 1967 amendment permitting parochial school transportation to be authorized by the legislators, had something more in mind when an affirmative majority vote was cast, than the mere payment of a small sum of money. Indeed, the petitioners further submit that the Wisconsin legislature itself, when it enacted the statutory scheme herein involved, had something more in mind in the ordinary situation than a payment by a school district of $80 per year to a parent. Yet, one may search this record carefully and discover the following transportation practices to be the actual history of Catholic Memorial transportation in the Mukwonago School District. This table was previously published in a brief submitted to the Wisconsin Supreme Court:

	Catholic	Public
"1. Length of run	64+ miles	19+ miles
2. Duration of run	1½-2 hours	40 minutes
3. Extracurricular buses	None	4 to 8 daily

> In 1973-1974 no publicly-provided transportation for Catholic high school students, whereas appellants know of no instance where parent contracts are used for public school students in the Mukwonago district.
>
> Explanation of superintendent for rationale of parent-contract policy — None."

When, to the plain sense of a litigant, there is no way that a benefit can be obtained under a statutory scheme that theoretically was designed to provide benefits to such litigant, there is no recourse except to invoke such litigants' equal protection rights.

It is undisputed, based on the materials submitted by the respondent, Barbara Thompson, in response to the petitioners' Interrogatories, to-wit: the pamphlets entitled "Transportation Facts," that the Wisconsin Department of Public Instruction has adopted a standard of twenty miles for the length of a bus run. From the foregoing chart, it is apparent that the Mukwonago School District scrupulously adheres to such standard with respect to the transportation of public school pupils. However, as the chart indicates, the Mukwonago School District exceeded such state standard by over forty-four miles during the entire period of transportation was provided to Memorial pupils by means of public carrier; in other words, from 1968 through school year 1972-1973. It is the same board of school directors as respondents in this case, along with the State Superintendent whose office permitted this situation to continue for over four years, who now tells the federal court that Memorial pupils residing in the Mukwonago district are not entitled to any transportation whatsoever on the sole basis that the premises their school is located on exceeds the five-mile limit by approximately 130 feet. This is a true measure of the mentality of the respondents, that they would have the temerity to ask the federal court to

rigidly enforce the five-mile limit in the situation where an overage is so minimal, and simultaneously expect the federal court to overlook the discriminatory treatment rendered to Memorial pupils when the state standard of twenty miles for a bus run was exceeded by forty-four miles. This is a classic case of a fox in the hen house administering a safety statute and policies thereunder. It is an especially sorry spectacle when one considers that the respondents are either educators or people who profess an interest in the quality of the education received by pupils in the Mukwonago district and then proceed to administer a program in a harmful way for personal, selfish reasons when the program involves Memorial pupils. Clearly, Memorial pupils in the Mukwonago district are a suspect class.

A thorough review of the allegations of the Complaint and a comparison thereof with the record will indicate that if one ignores the bare, general denials contained in the Answers, the facts alleged in the Complaint are not in dispute. There is no genuine denial of the facts alleged in the Complaint. The dispute lies in whether one makes the inference that such conduct was not neutral, benevolent, even-handed and equitable. It is noteworthy that Supreme Court justice nominee, Sandra O'Connor, recently testified before the U.S. Senate Judicial Committee to the effect that her own personal experience of being transported by bus to and from school for a distance of seventy-five miles round trip was, in her view, not beneficial to the pupils being transported. In the case involved herein Memorial pupils were transported 128 miles round trip per day, while purely discretionary extracurricular transportation was being utilized by the public school district at a cost more than three times that involved in mandatory busing of Memorial students. The issues of the case regarding discriminatory administration of these laws have not

been resolved, discussed or weighed by the trial court. These issues have been almost totally ignored.

II. The Federal Court Of Appeals Has Rendered A Decision In This Case Which Appears To Conflict With The Ruling Of A Three-Member Panel In Deutsch v. Teal.

Section 121.54 Wisconsin Statutes creates rights to transportation on behalf of non-public school pupils, but limits the mandatory requirement of transportation to pupils who attend a non-public school located within their school district or within five miles of the boundary thereof. In 1975, a three-judge federal court decided the case of *Deutsch v. Teel*, 400 F. Supp. 598 (1975), determining that the denial of transportation to Jewish parochial school children on the sole basis that the school they attended was located 400 feet beyond the municipal boundary of the City of Milwaukee lacks sufficient rational basis to withstand an attack under the fourteenth amendment to the U.S. Constitution. The subsection of the above statute involved in the *Deutsch* case is different from the subsection that applies to non-city school districts. The Wisconsin Supreme Court, in viewing and comparing this case with the *Deutsch* case, stated in *Young v. Board of Education*, 74 Wis. 2d 144, 246 N.W. 2d 230 (1976), that reasonable uniformity in the maximum distances pupils are transported may be required. At the present time, most of the pupils attending Catholic Memorial and residing in the Mukwonago School District do not live any farther from their school than many public school pupils who are being transported to the public high school. The petitioners cannot understand why one pupil living twelve miles from school is entitled to transportation, and another is not. The petitioners

have studied the facts cited as distinguishing the *Deutsch* case from the Memorial case and are unable to accept the rationale propounded, the perception being that there is a distinction in the law presently enunciated between the treatment rendered Jewish parochial school pupils and Memorial pupils.

CONCLUSION

Certiorari should be granted to review the judgments and decisions of the courts below and to resolve the important constitutional issues already recognized by the Wisconsin Supreme Court, and to correct the obvious and glaring discriminatory treatment historically received by Catholic Memorial pupils residing in the Mukwonago School District.

Respectfully submitted,

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued October 23, 1980
Amended July 10, 1981 to include appendix
July 2, 1981

Before

Hon. *LUTHER M. SWYGERT, Senior Circuit Judge**

Hon. *WILBUR F. PELL, JR., Circuit Judge*

Hon. *RICHARD D. CUDAHY, Circuit Judge*

JOHN E. O'CONNELL AND
JEANNE O'CONNELL, Individually
and as members of a class,
Plaintiffs-Appellants,

No. 80-1397
vs.

GORDON KNISKERN, Superintendent
of Schools of the School District of
Mukwonago, and GEORGE CHRONIS,
THOMAS DAY, ROBERT HILL,
WAYNE LEENHOUTS, EDGAR SCHULTZ,
CLIFFORD SULLIVAN, and RUTH
ELLEN YERKE, as members of
the Board of School Directors
of the School District of Mukwonago,
and BARBARA THOMPSON,

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*At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

Superintendent of the State of Wisconsin Department of Public Instruction,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 78-C-230
John W. Reynolds, *Judge*.

ORDER

Plaintiffs have appealed from the district court's grant of summary judgment to the defendants in appellants' §1983 suit seeking to compel the defendants to transport appellants' children to and from their homes and Catholic Memorial High School in Waukesha, Wisconsin. The high school is located slightly more than five miles from the nearest boundary of the Mukwonago School District where the appellants live. Appellants allege that the defendants' decision in 1974 to transport children only to those schools within five miles of the boundary, the minimum required by state statute, Wis. Stat. §121.54 (2) (a) and (b) (1), and the statute itself, violates the equal protection clause of the Fifth Amendment to the United States Constitution.[1]

The district court held that no fundamental rights were at issue and that the decision did not impose any suspect classifications. It concluded that the decision had a rational basis in legitimate governmental

[1] Appellants do not assert that the decision was arrived at in violation of due process.

objectives and thus granted summary judgment to the defendants. Plaintiffs have appealed from that decision basically realleging their claims made in the district court.

We agree with the judgment and the opinion of the district court as set forth in the appendix of this order and therefore adopt that opinion as our own, with the following addition.[2]

Appellants rely upon *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975), in which a three-judge federal court struck down a local school board's decision to provide transportation to students who attended private schools located within the city limits, but not to students who attended a private school located approximately 400 feet beyond the city limits. The court reviewed the fiscal and other considerations that were offered by the defendants to support their decision and concluded that the offered justifications did not amount to a rational basis inasmuch as the board transported other children much greater distances within the city than would be required to transport the plaintiff children.

In addition to the distinctions between *Deutsch* and the present case drawn by the district court, and to the fact that *Deutsch*, although entitled to respectful consideration is nevertheless not binding upon this court, we find the justifications offered by the defendants in this case *are* founded on a rational basis sufficient to withstand constitutional attack. Appellants themselves acknowledge that the trip to and from Catholic Memorial High School is much longer than the corresponding trips to and from the

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[2] Our adoption does not include the footnote contained in the district court's opinion regarding potential "entanglement" problems that were never at issue in the present litigation.

public high school in the district.[3] Assuming the comments made in *Deutsch* to be correct, that the distance over which a student is transported bears a direct relationship to the cost of the transportation, 400 F. Supp. at 605, it is clear that unlike *Deutsch*, the exclusion of appellants from the benefits of state-financed transportation here does implement fiscal and monetary goals, *see Geduldig v. Aiello*, 417 U.S. 484, 994-997 (1974), as well as safety considerations. *Cartwright v. Sharpe*, 162 N.W. 2d 5, 11 (Wis. 1968).

In summary, there are no fundamental rights at issue and neither the statute nor the defendants' decision facially impose any suspect classifications. Although neutral statutes can be enforced in discriminatory fashions, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), there was no showing in this case that the defendants intended to discriminate against the appellants. *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979), *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). At the time appellants' school was deprived of the transportation services, transportation to two Lutheran schools outside the five-mile limit was similarly eliminated. Appellants conceded at oral argument that all schools outside the five-mile limit, whatever their religious affiliation if any, were treated equally. Furthermore, the district court found that the defendants provided transportation to other Catholic

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[3] The trips to and from the appellants' school could equal or exceed 64 miles in length and may last two to three hours. The trips to the public school were approximately 19 miles and would last approximately 40 minutes. Although the appellants imply this difference establishes discriminatory conduct, they have not attempted to show shorter routes were possible.

and Lutheran schools located within the five-mile limit. In these circumstances, we find no error in the district court's opinion or judgment. Accordingly, the judgment is affirmed, costs against the appellants.

AFFIRMED.

Unpublished Per Curiam Order
JUDGMENT — ORAL ARGUMENT
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
July 2, 1981

Before

Hon. *LUTHER M. SWYGERT, Senior Circuit Judge**

Hon. *WILBUR F. PELL, JR., Circuit Judge*

Hon. *RICHARD D. CUDAHY, Circuit Judge*

JOHN E. O'CONNELL and
JEANNE O'CONNELL,
Plaintiffs-Appellants,

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GORDON KNISKERN,
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Schools of the School
District of
Mukwonago, et al.,
Defendants-Appellees.

Appeal from
the United
States District
Court for the
Eastern District
of Wisconsin

No. 78-C-230
John W. Reynolds,
Judge.

This cause was heard on the record from the United States District Court for the *Eastern* District of *Wisconsin,* and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

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*At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN E. O'CONNELL AND
JEANNE O'CONNELL, Individually
and as members of a class,
Plaintiffs,

v.

GORDON KNISKERN, Superintendent
of Schools of the School District of
Mukwonago, and GEORGE CHRONIS,
THOMAS DAY, ROBERT HILL,
WAYNE HUNNICUTT, WILLIAM
KINGSTON, MAXINE LEENHOUTS,
EDGAR SCHULTZ, CLIFFORD
SULLIVAN, and RUTH ELLEN YERKE,
as members of the Board of
School Directors of the School District
of Mukwonago, and BARBARA
THOMPSON, Superintendent of the
State of Wisconsin Department of
Public Instruction,
Defendants.

DECISION AND ORDER

Civil Action
No. 78-C-230

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983.

Plaintiffs represent the class of parents who are residents of the Mukwonago School District and whose children attend the Catholic Memorial High School ("Memorial") in the City of Waukesha. Defendants are Wisconsin State Superintendent of Schools Barbara Thompson, Mukwonago School Superintendent Gordon Kniskern, and various individual members of the

Mukwonago School Board. At issue is defendants' refusal to provide bus transportation to Memorial students residing within the Mukwonago School District. The underlying facts are not in dispute, and the parties have submitted cross motions for summary judgment.

Under Wisconsin law, school districts must provide bus transportation to students who attend private schools located two or more miles from their place of residence and not more than five miles beyond the boundaries of the school district. See § 121.54(2), Wis. Stats. If a private school is located more than five miles from the boundaries of a school district, the district may still elect to provide transportation, but it is not required to do so by statute.

The Mukwonago School District is a consolidated district which was established in 1971. Catholic Memorial High School is a private sectarian school which is located slightly more than five miles from the nearest boundary of the Mukwonago School District. From 1971 through 1974, the Mukwonago district electors voted at the annual district meeting to transport students to Memorial. Following the 1974 school year, the district electors narrowly voted down the resolution to finance bus transportation to Memorial, and no such transportation has been provided since that time.

Plaintiffs seek a declaration that the statutory scheme, on its face or as applied to the plaintiffs, operates to deny plaintiffs the equal protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiffs originally commenced an action in state court which was ultimately terminated by the Wisconsin Supreme Court without a judgment on the merits. *O'Connell v. Board of Education*, 82 Wis. 2d 728, 264 N.W. 2d 561 (1978). This action was commenced in 1978 and was certified as a class action on June 12, 1979.

Courts faced with social welfare legislation which is alleged to deprive some persons or groups of the equal protection of law must undertake a two-step analysis. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). The first step is to determine the level of scrutiny to which the legislation will be subjected. A statute which affects the exercise of a fundamental personal freedom or which divides persons into "suspect" classes will be subjected to strict scrutiny. A statute which does not affect fundamental freedoms or utilize suspect classes will be subjected to a lesser level of scrutiny. The second step of the equal protection analysis is to subject the challenged statute to the appropriate level of scrutiny. A statute which is subject to strict scrutiny will only be upheld if it serves an important government objective that could not be accomplished through less burdensome means. A statute subject to the lesser level of scrutiny will be upheld if it rationally serves a legitimate government objective.

Plaintiffs in this action do not claim that § 121.54(2) impinges upon any fundamental personal freedom. Rather, they argue that the statute, on its face and as applied, discriminates against parents who choose to send their children to Catholic schools. This characterization of the statutory scheme, however, is not supported by the record.

Prior to 1967, the Wisconsin constitution prohibited public school districts from providing publicly-funded transportation to students attending private schools. *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962). In 1967, the Wisconsin constitution was amended to permit the transportation of students to private schools. Wis. Const. Art. I § 23. Section 121.54(2) now *requires* school districts to provide publicly-financed transportation to students attending private schools located within five miles of the school district boundaries.

The record shows that defendants have complied with the statutory mandate. During the 1978-79 school year, defendants provided transportation to 182 students attending Catholic schools within the Mukwonago School District and to 51 students who attend a Catholic school located outside the school district but within five miles of the school district boundaries. (Affidavit of Gordon Kniskern, filed July 31, 1979, at 3-4.) In addition, defendants provide transportation to three Lutheran schools located within the school districts. *Id.*, at 3.

The statute can only be characterized as implementing legislation designed to provide parents of students who attend private schools with a benefit that, until recently, they were not entitled to receive under the Wisconsin constitution. It is true that not all parents of students who attend private schools are entitled to such benefits. Specifically, parents of children who attend private schools located more than five miles from the boundaries of the school district are not entitled to publicly-funded transportation unless approved by the electors of the district. This hardly amounts, however, to discrimination on the basis of religion. The statute can much more fairly be read as distinguishing between parents whose children attend private schools located within five miles of the school district boundaries and parents whose children attend private schools located more than five miles beyond the school district boundaries. Accordingly, the statute on its face does not provide disparate treatment on the basis of suspect classifications.

Plaintiffs point out that a statute may be neutral on its face and yet be applied in a discriminatory manner. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The statute in this case is applied by the electors of the Mukwonago School District who vote at their annual meeting whether or not to fund transportation to

Catholic Memorial High School.* Plaintiffs have made no showing that the decision not to provide transportation to Memorial students was motivated by a discriminatory purpose, nor has the existence of such a discriminatory purpose been alleged, and this court is not deciding what the outcome would be if the complaint contained such an allegation. Absent such an allegation, the existence of religiously motivated antipathy will not be inferred by the court. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Since there has been no showing that the challenged statute operates to discriminate on the basis of suspect classifications, the Court is required to limit its inquiry to whether or not there is a rational connection between the statutory classifications and legitimate government objectives. The government objectives sought to be served by the instant classification are readily apparent. The enactment of § 121.54(2) evidences the legislature's desire to compel school districts to provide publicly-financed transportation to students attending private as well as public schools. The legislature, however, thought it wise to put some sort of geographic limitation on the districts' duty to transport. Students attending public schools are only entitled to transportation to "the nearest public school they are entitled to attend." § 121.54(2) (a), Wis. Stats. Such a geographical limitation would be impracticable with respect to private schools, and so the legislature substituted the five-mile limitation instead.

The imposition of a geographical limitation on a school district's duty to transport is a legitimate government objective. Financial and safety considerations would seem to make some sort of limitation indispensible. The next issue is whether, as a matter of

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*[Footnote Omitted]

constitutional law, this Court should impose limitations that are different than those settled upon by the Wisconsin legislature.

The process of legislation by its very nature involves line drawing. Often the lines are drawn more or less arbitrarily with little thought given to the impact on a particular situation. While it may be unfortunate that Memorial students are denied the guarantee of publicly-funded transportation because their school is located 130 feet beyond the line drawn by the legislature, the remedy does not lie with the federal courts. As stated in the recent case of *Personnel Administrator of Massachusetts v. Feeney*, — U.S. —, 99 S.Ct. 2282, 2292 (1979):

> "The Equal Protection Guarantee of the Fourteenth Amendment does not take from the States all power of classification. [Citation omitted.] Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. [Citations omitted.] The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. [Citations omitted.] In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. [Citations omitted.] When some other independent right is not at stake, [citations omitted] and when there is no 'reason to infer antipathy,' [citation omitted] it is presumed that 'even improvident decisions will eventually be rectified by the democratic process ....' *Ibid.*"

Plaintiffs argue that the case is controlled by *Deutsch v. Teel*, 400 F. Supp. 598 (1975). In that case the Milwaukee School District transported students to public and private schools within the Milwaukee city limits but refused to transport students to private schools located beyond the city limits. A three-judge panel found defendants' refusal to transport students beyond the city limits to be irrational inasmuch as there was evidence that public school students were transported much greater distances within the city limits.

The case is distinguishable on two grounds. First, students in the instant case are transported pursuant to a different statutory scheme than was at issue in *Deutsch*. The so-called "city option" at issue in *Deutsch* required that the Milwaukee School District transport students to schools located within the city limits and no further. The statute at issue in these proceedings is much more liberal in that it requires the Mukwonago School District to transport students up to five miles beyond the district boundaries. Secondly, unlike *Deutsch*, there is no evidence in this case that public school students are transported greater distances than the distance that would be travelled were the school district to provide transportation to Memorial students. Public school students, in fact, are only entitled to transportation to the public school nearest their residence, a limitation not imposed on students attending private schools. Accordingly, the disparate treatment in this case is only among private school students, not among public school and private school students as was the case in *Deutsch*.

Based on the foregoing, the Court finds that plaintiffs and the class they represent have not been denied the equal protection of law, and, accordingly, defendants are entitled to summary judgement.

IT IS THEREFORE ORDERED that judgement in the above-entitled action be entered in favor of the defendants.

Date at Milwaukee, Wisconsin, this 29 day of February, 1980.

/s/
John W. Reynolds,
Chief Judge

United States District Court

For the Eastern District of Wisconsin

JOHN E. O'CONNELL and JEANNE O'CONNELL, individually and as members of a class,

Plaintiffs,

JUDGMENT

vs

GORDON KNISKERN et al.

Civil Action File No. 78-C-230

This action came on for (hearing) before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered. It is Ordered and Adjudged that judgment is hereby entered for the defendants and against the plaintiffs.

Dated at Milwaukee, Wisconsin, this 29th day of February, 1980.

/s/
Deputy Clerk

Opposition

81-624

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October 1981, Term

JOHN E. O'CONNELL and
JEANNE O'CONNELL, Individually,
and as members of a class,
Petitioners,

v.

GORDON KNISKERN, Superintendent of Schools of the School District of Mukwonago, and GEORGE CHRONIS, THOMAS DAY, ROBERT HILL, WAYNE HUNNICUTT, WILLIAM KINGSTON, MAXINE LEENHOUTS, EDGAR SCHULTZ, CLIFFORD SULLIVAN, and RUTH ELLEN YERKE, as members of the Board of School Directors of the School District of Mukwonago, and BARBARA THOMPSON, Superintendent of the State of Wisconsin Department of Public Instruction,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

Amended State of The Case 2

Argument 3

I. The Application Of Section 121.54(2) (b) 1. Wis. Stats., Has Not Resulted In Discriminatory Treatment Of The Petitioners. 3

II. The Decision Of *Deutsch v. Teel*, 400 F. Supp. 598 (1975), Is Consistent With The Decision In This Case. 4

Summary 5

CITATIONS

Page

Cases

Deutsch v. Teel,
400 F. Supp. 598 (1975) 4

Finkel v. New York City
Board of Education,
474 F. Supp. 468 (1979),
aff'd 622 F.2d 573 (1980) 5

O'Connell v. Board of Education,
82 Wis. 2d 728, 264
N.W. 2d 561 (1978) 3

San Antonio Independent School
District v. Rodriguez,
411 U.S. 1, 93 S.Ct. 1278,
36 L.Ed. 2d 16, reh. den.,
411 U.S. 959, 93 S.Ct.
1919, 36 L.Ed. 2d 418 (1973) 4

Vance v. Bradley,
440 U.S. 93, 99 S.Ct. 939,
59 L.Ed. 2d 171 (1979) 4

Young v. Board of Education,
Joint Dist. No. 10,
74 Wis. 2d 144, 246 N.W.
2d 230 (1976) 2

No.

IN THE

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JOHN E. O'CONNELL and
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GORDON KNISKERN, Superintendent of
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of School Directors of the
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and BARBARA THOMPSON,
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Public Instruction,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

AMENDED STATEMENT OF THE CASE

The petitioners' statement of the case does not adequately apprise the Court of either the history of the litigation or the nature of the action.

In October, 1974, the petitioners commenced an action in the Circuit Court of Waukesha County, Wisconsin, for declaratory relief under Section 269.56, Wis. Stats. (1973). The petitioners reside in the Mukwonago School District and are parents of children attending Catholic Memorial High School, which is located in Waukesha, Wisconsin. Section 121.54(2) (b) 1., Wis. Stats. (1973), requires the Mukwonago School District, and all other school districts in the State of Wisconsin, to provide publicly financed transportation to children residing in the district and attending private schools located in the district or not more than five miles from the nearest school district boundary. The petitioners initially contended that the nearest boundary line of the Mukwonago School District was within five miles of the grounds of Catholic Memorial High School. The trial court ordered a number of measurements and concluded that the school was, in fact, located more than five miles from the nearest school district boundary. This decision was appealed to the Wisconsin Supreme Court. In *Young v. Board of Education, Joint Dist. No. 10,* 74 Wis. 2d 144, 246 N.W. 2d 230 (1976), the Wisconsin Supreme Court confirmed the trial court finding with respect to distance. However, in that appeal the petitioner raised for the first time the question of whether Section 121.54(2) (b) 1., Wis. Stats. (1973) was unconstitutional on its face or as applied to the Petitioner. As this issue was not considered in the trial court, the matter was remanded for further proceedings.

A second trial was held, and the trial court concluded that the statute did not violate the equal protection laws of the United States Constitution, nor was the statute being unconstitutionally applied to the plaintiffs. This decision was again appealed. However, the Wisconsin Supreme Court dismissed the proceeding because the petitioner had failed to serve the Attorney General's office with notice of the proceeding as is required by the Uniform Declaratory Judgment Act. *O'Connell v. Board of Education,* 82 Wis. 2d 728, 264 N.W. 2d 561 (1978).

The petitioners then filed the instant action in the District Court for Wisconsin on April 14, 1978. In substance, the petitioners again sought declaratory and injunctive relief, contending that Section 121.54(2) (b) 1., Wis. Stats. (1973), was unconstitutional on its face or as applied to the petitioners by the Mukwonago School District. The respondents moved for summary judgment as to the issues raised by the pleadings, and the motion was granted by the District Court on February 29, 1980. 484 F. Supp. 896 (1980) An order affirming the District Court decision was entered by the 7th Circuit Court of Appeals on July 2, 1981. It is from this order and judgment that appeal is taken.

ARGUMENT

I. The Application Of Section 121.54(2) (b) 1. Wis. Stats., Has Not Resulted In Discriminatory Treatment Of The Petitioners.

The petitioners contend that the certiorari should be granted because the record discloses discriminatory application of the statute in issue.

The respondents submit that certiorari is inappropriate in this case. It should be noted that there are no fundamental rights at issue in these proceedings.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed 2d 16, reh. den., 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418 (1973). Furthermore, the petitioners have not alleged, nor have they attempted to introduce any evidence which would tend to show that the respondents' actions are the result of antipathy or invidious discrimination. *Vance v. Bradley,* 440 U.S. 93, 99 St. Ct. 939, 59 L. Ed. 2d 171 (1979). Futhermore, the facts urged by the petitioners as evidencing discriminatory conduct have been considered and dismissed by the Circuit Court of Waukesha County, Wisconsin, the Federal Court of Wisconsin, and the 7th Circuit Court of Appeals.

II. The Decision of *Deutsch v. Teel,* 400 F. Supp. 598 (1975), Is Consistent With The Decision In This Case.

The petitioners contend that the decision of *Deutsch v. Teel,* 400 F. Supp. 598 (1975), is inconsistent with the decision in this case. A plain reading of the *Deutsch* decision dispels that contention. In *Deutsch,* the policy of the Milwaukee School Board to provide publicly financed transportation to children residing within the district was held to violate the equal protection clause the United States Constitution insofar as the policy restricted such publicly financed transportation to the school district boundaries. The *Deutsch* case, however, is distinguishable in that the school district promulgated its policy in accordance with Section 121.54(1), Wis. Stats. (1973). This subsection, known as the "city option" statute, provided that the school district could determine whether or not to provide publicly financed transportation. If the school district elected to provide such transportation, it was directed to provide such transportation on a reasonably uniform basis. The District Court conclud-

ed that in order to comply with the requirement that such transportation be accomplished on a reasonably uniform basis, the district was required in some instances to transport students beyond the school district boundary.

Conversely, Section 121.54(2) (b) 1., Wis. Stats., does not vest the school district with discretion either as to whether or not to provide transportation, or the distances which that transportation will be provided. The statute specifically requires transportation to be provided all students residing at least two miles from the school which they attend, and, where the school is located outside the school district boundaries, then to any such school provided that the school is located not more than five miles from the nearest school district boundary. In other words, the *Deutsch* decision involved a provision of the statute vesting discretion in the school board to establish busing policies, whereas the legislature has established many of those policies with respect to the statute in question.

Furthermore, although the petitioners do not argue that the five-mile limitation is unreasonable, it should be noted that a similar transportation limitation was considered and found facially constitutional in *Finkel v. New York City Board of Education*, 474 F. Supp. 468 (1979), aff'd 622 F. 2d 573 (1980).

SUMMARY

In summary, respondents respectfully submit that the petition for writ of certiorari should be denied for the following reasons:

1. The statute in issue does not affect a fundamental right.

2. The Complaint does not allege the respondents' actions are the result of an antipathy or invidious discrimination.

3. The alleged discriminatory treatment has been thoroughly considered and dismissed.

4. The Deutsch v. Teel decision is inapplicable.

Respectfully submitted,

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